

Arguments for horizontal legislative action to ensure even and effective protection for whistleblowers in the EU

Greens/EFA Position Paper in the context of the European Commission Public Consultation on Whistleblower Protection



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Foreword

The essential role played by whistleblowers when it comes to the prevention, reporting and remedying of wrongdoing is no longer a topic of debate: the wide range of cases uncovered thanks to the reporting of brave individuals continues to stack up, and numerous international organisations have already laid the groundwork for legislators to act by putting together international standards that call for the adoption of legal frameworks on whistleblower protection.

The current context in the European Union gives us reason for hope: To implement these international standards, the European Parliament has repeatedly called on the European Commission to propose horizontal EU legislation on whistleblower protection. In October 2016, the European Council echoed these calls and requested that the Commission assess the scope for strengthening the protection of whistleblowers in EU law, in line with the principle of subsidiarity. The Council of Justice Ministers has also started to engage in discussions on the issue.

For its part, the European Commission has taken great strides to push the topic forward, with President Juncker making public commitments on the need to protect whistleblowers, plus the establishment of an inter-service working group within the Commission, the recent launch of a public consultation on the matter, and the decision to conduct an impact assessment. The level of ambition has therefore multiplied, as has the speed at which this issue is being dealt with: the European Commission is aiming to take action before the end of 2017.

We have therefore moved into a new phase; with deliberations now revolving around the *nature* or *scope* of EU action on the matter. In the Commission's recent Inception Impact Assessment, key questions focus on the need for either "horizontal" or "sectorial" action on whistleblower protection, and on whether or not the EU should take legislative action, or rather focus on non-legislative measures.

While there are relatively few Member States that have whistleblower protection provisions, an enormous amount of work has already been done on the matter, and some lessons have already

been learnt. One of the key lessons is that whistleblower protection should be as clear and straightforward as possible, in order to provide legal certainty both for the person considering blowing the whistle, and for their employer, the public institutions, the journalists that might be involved, and the wider public. The other lesson learned so far is that a soft law approach is not sufficient, but neither is purely legislative action. In fact, the best systems revolve around legal obligations and guarantees which are then complemented through a series of accompanying measures guided by existing soft law and best practices – such as the establishment of an advice centre, training programmes, hotlines, legal and psychological support, etc.

It is of utmost importance that any action taken by the EU on the matter serve to change the balance of power so that individual citizens and workers no longer fear the consequences of reporting wrongdoing or of revealing information that is in the public interest. The EU needs, now more than ever, to show to citizens that it is capable, relevant and committed to defend values that are common to us all.

Following a long series of soft-law tools adopted by various international organisations, the added value of EU action would only be ensured if the EU took legally binding measures to implement these standards; not to mention that public expectations are that the EU should lead by example in this area in any case. This is why **we are convinced that a robust horizontal Directive to establish minimum levels of protection for whistleblowers across the Union, that covers both the private and public sectors, would be the only real solution.**

Pascal Durand, Benedek Jávor, Julia Reda and Molly Scott Cato

Executive Summary

The protection of whistleblowers has now been established as a key issue on the EU agenda. On the one hand, thanks to revelations by whistleblowers, the EU has taken a number of policy steps that would be very unlikely to have been taken otherwise, notably in the area of taxation or environmental protection. On the other hand, the existing patchwork of provisions at both EU and Member State level means that, to date, both current and potential whistleblowers have no real idea of whether or not they will be protected, let alone what conditions they have to fulfil and who exactly will grant them protection. Because of this, the EU institutions have now recognised that there is a need for them to take action, the question being what type of action should be taken and how ambitious it should be.

In the context of the European Commission's recently launched public consultation on whistleblower protection, in this paper we offer arguments for legislative as opposed to non-legislative action, and for the establishment of a horizontal approach that would cover whistleblowers in all areas, rather than continuing down the path of expanding on the existing patchwork of provisions in sectorial legislation in an attempt to fill the many existing gaps.

We argue that soft law on whistleblower protection is insufficient for addressing the problem, due to its complex and wide-spread nature; while acknowledging the ground breaking work done to produce several international standards and guidelines that now simply need proper implementation. We suggest that the legislative power of the EU is in itself an added value; since it would be only thanks to the EU that a common set of legally binding standards could be effectively applied across the Union.

In the briefing, we argue that a horizontal rather than sectorial approach, which would apply to both the public and private sectors, should be taken. A strong reason for not continuing to insert provisions that serve the protection of whistleblowers in sectorial EU laws is the opacity that this would create and the resulting lack of legal certainty both for the potential whistleblower as well as for the employer and the wider public. Legal uncertainty could – and indeed already is - deterring potential whistleblowers from coming forward. Lessons learned from experiences in countries with dedicated whistleblower legislation demonstrate that strong legislation and a unitary approach make a tangible difference in practice.

In addition, we highlight that protecting whistleblowers is necessary for the proper implementation of EU law and for the effective functioning of EU policies, which is already recognised as a key objective of whistleblower protection by the European Commission, given that whistleblower provisions have already been included in a variety of sector-specific EU legislation.

Having just celebrated the 60th anniversary of the Treaty of Rome, we see that the protection of whistle-blowers across the Union is likewise needed to guarantee the materialisation of the EU's four basic freedoms, which are built upon the idea that there should be freedom of movement regardless of borders. Damages to the environment and threats to public health are likewise typically ignorant of borders and the same logic applies to consumer goods or food, since any unsafe product that is produced in the EU would also, by its very nature, cross borders. The same is true with regards to the movement of capital and services, where there is hardly any issue with a more obvious EU relevance than certain EU countries pursuing predatory tax policies that rob other member states of their tax revenues. As for workers, in the EU's common market the free movement of goods and capital is accompanied by the free movement of the labour force.

The conclusion is that there is an obvious added value of EU action to legislate to protect whistleblowers in a range of different sectors. The EU institutions are the best placed to act to protect the pan-European public interest and to ensure the proper implementation of EU legislation. Horizontal legislative action should be taken by the EU to – inter alia – further the unity and proper functioning of the common market, protect consumers, protect worker's rights and improve working conditions in the EU's common labour market, protect the environment, ensure the effective implementation of EU law, and further the exercise of fundamental rights enshrined in the EU Charter of Fundamental Rights and the European Convention on Human Rights.

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1. Introduction: the state of whistleblower protection in Europe

Whistleblowing has the potential to unveil crime but also other wrongdoing or threats to the public interest in areas such as the rule of law, human rights, public health and safety, consumers' rights, financial integrity, environmental protection, the use of public funds, accountability of public governance and services, or a clean and transparent business environment. Whistleblowing is one of the most effective ways of bringing ongoing wrongdoing to a halt and of preventing threats in the first place from occurring. Yet, more often than not, whistleblowers suffer a great professional and personal cost as a result of their disclosures.

In most cases, whistleblowers lose their jobs, their benefits, their future career prospects and reputation because they are labelled as snitches, traitors or troublemakers and then “blacklisted” or shunned by an entire sector. They often suffer from harassment, threats and legal persecution. They spend a good deal of their lives in courtrooms after they have blown the whistle. Many of them have to face lasting financial hardship, and/or mental illness, and in many cases these consequences disrupt their family lives.¹

Although all or most EU member states are signatories to international conventions that recognise the need for protecting whistleblowers and foresee measures to this end, and although NGOs and international organisations, including the Council of Europe, the OECD, and the United Nations have issued recommendations and published compendia of best practices, the legal protection afforded to whistleblowers in the EU leaves much to be desired. Where protection exists, provisions tend to be scattered across different laws leaving loopholes and gaps. Despite increasing domestic debate and even recent legislative developments on the national level (e.g. in France), still only a handful of EU member states provide adequate protection to those who speak up in the public interest.²

¹ <http://www.theguardian.com/society/2014/nov/22/there-were-hundreds-of-us-crying-out-for-help-after-life-of-whistleblower>

² For a detailed overview of the state of play in the different Member States please consult: http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu

Even between those countries, there are substantial differences in mandates given to market regulators to receive and act upon whistleblower disclosures.³ Domestic provisions in the majority of EU member states **tend to be limited to a sector (public sector v. private sector), or to be limited in scope and scattered across different laws (ranging e.g. from anti-corruption to witness protection laws, etc.), which leaves significant loopholes and gaps.** In still other countries, there is no protection for whistleblowers at all.

At the EU level, provisions on whistleblower protection are found in various pieces of sectorial legislation, including in the Market Abuse Regulation, the Directive on Capital Requirements, the Directive on the safety of offshore and gas operations, etc.

In the last decade, the European Parliament, civil society organisations, journalists and trade unions have repeatedly called on the European Commission to propose horizontal EU legislation on whistleblower protection to set minimum levels of protection that would apply in all EU Member States. In May 2016, the Greens/EFA Group in the European Parliament published an assessment of the possible legal bases for such EU action in line with the principle of subsidiarity, alongside a full draft directive, to further the discussion on the issue⁴.

For its part, the European Commission is set to propose action to protection whistleblowers by the end of 2017. President Juncker, in his Letter of Intent complementing his 2016 State of the Union speech, expressed commitment from the Commission's part to assess the scope for EU action to strengthen the protection of whistleblowers across the Union, and a public consultation and impact assessment on the matter is currently ongoing.

3 Vandekerckhove, W (2010). European Whistleblower Protection: Tiers or Tears? In D. Lewis (ed), A Global Approach to Public Interest Disclosure, pp. 15-35, D. Lewis, ed., Edward Elgar. Available at: <https://ssrn.com/abstract=1793130>

4 https://www.greens-efa.eu/legacy/fileadmin/dam/Images/Transparency_campaign/WB_directive_draft_for_consultation_launch_May_2016.pdf

2. Why should the European Union act to protect whistleblowers?

2.1 The added value of Union action is its power to legislate

The Commission's Inception Impact Assessment considers a soft-law approach as a possible option, "through e.g. recommendations, guidance, exchanges of best practices, peer review, specific monitoring in the context of the European Semester, promotion of self-regulation." However, all or most EU member states are already parties to numerous international legal instruments that recognise the need to provide protection and support for whistleblowers. Despite this, the numerous recent assessments of the state of play in the area of whistleblower protection in the EU⁵ have shown that only a handful of EU member states have advanced legal protection for whistleblowers, whereas the situation in the rest of the EU leaves much to be desired.

This could change, if the EU were to take decisive action. Indeed, the fundamental nature of action by the European Union is that it can legislate, namely to create legally binding norms for its Member States. **Prescribing legally binding standards on itself and on the Member States for the protection of whistleblowers is a logical next step, following the long series of soft-law tools developed by international organisations and civil society.**

Existing standards include the Council of Europe Civil Law Convention on Corruption, whose Article 9 provides for the protection of workers against any unjustified sanction for those who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities,⁶ the Council of Europe Criminal Law Convention;⁷ and the United Nations Convention against Corruption, whose Article 33 stipulates that all parties to the Convention shall consider incorporating whistleblower protection into their domestic legal systems.⁸

⁵ OECD (2016), *Committing to Effective Whistleblower Protection*, OECD Publishing, Paris.

DOI: <http://dx.doi.org/10.1787/9789264252639-en>;

http://www.transparency.org/whatwedo/publication/speak_up_empowering_citizens_against_corruption;

http://www.restartingthefuture.eu/assets/files/WhistleblowingReport_April2.pdf;

http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu

⁶ <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f6>

⁷ <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007f3f5>

⁸ https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

In 2009, the Council of the OECD adopted the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions, which requires all parties to the Anti-Bribery Convention - including 23 of the 28 EU countries - to adopt whistleblower protection measures in both the public and private sectors.⁹

In 2014 the Council of Europe (CoE) Committee of Ministers adopted Recommendation CM/Rec (2014)7 on the protection of whistleblowers. It urges CoE member states to put in place comprehensive national frameworks for the protection of whistleblowers standing in a *de facto* working relationship with a public or private organisation, paid or unpaid, regardless of their legal status.¹⁰

International organisations and NGOs have repeatedly provided guidelines and compendia of best practices to help countries in designing their legal frameworks for the protection of whistleblowers. Other international standards that require implementation include Section IV on the protection of whistleblowers in the report of the United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression of September 2015,¹¹ the G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers,¹² and Transparency International's International Principles for Whistleblower Legislation.¹³

The groundwork has therefore already been laid, and it is now time for the European Union to use its competences to ensure that whistleblower protection is implemented in practice, through legislation, in all EU countries.

2.2 There is a European Public Interest that the EU is best placed to protect

Our starting point is that there is a common European public interest which in some cases may even be in contradiction with the short-term national interest of one or more Member States. The Luxleaks example is a case in point, but it could also be the case that a neighbouring country suffers from

⁹ <https://www.oecd.org/daf/anti-bribery/44176910.pdf>

¹⁰ [http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec\(2014\)7E.pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/CDCJ%20Recommendations/CMRec(2014)7E.pdf)

¹¹ <http://www.refworld.org/docid/5629ed934.html>

¹² <http://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

¹³ http://www.transparency.org/whatwedo/publication/international_principles_for_whistleblower_legislation

environmental contamination, or that corruption occurring in one country has a negative impact on the others. Indeed, the nature – and added value – of the EU itself rests upon its ability to find a balance between the various national interests, in order to identify and defend a common European interest.

In addition, having similar minimum standards for the protection of whistleblowers across the Union is a way to ensure that the European public interest is not circumvented by complex and potentially contradictory legal systems in the different Member States. Indeed, it would put an end to the kind of “forum shopping” that resulted in French citizens being tried and convicted in Luxembourg by a multinational company. Conversely, it would also make life harder for criminals or wrongdoers who abuse multiple jurisdictions in order to evade scrutiny or accountability, as there would be a new deterrent in all EU Member States that could significantly increase the chances of getting caught.

It is therefore logical to assume that – in a field like whistleblowing, in which there are multiple cross border elements (crime, corruption, distortion of the market, unsafe or adulterated consumer goods, the environment, transport, the fact that EU workers and capital are mobile, etc.) – there would be a natural and leading role that the EU institutions should play.

2.3 Whistleblowing serves the implementation and effectiveness of EU policies

Protecting whistleblowers is **necessary for the proper implementation of EU law and for the effective functioning of EU policies**. This is already recognised by the European Commission as specific whistleblower provisions are already reflected in a variety of sector-specific EU legislation.

For example, Regulation 596/2014 of the European Parliament and of the Council on market abuse recognises that effective whistleblower protection is essential to ensure that the regulation achieves its purpose, i.e., the fairness of competition in the financial sector. The preamble of the Regulation argues that “whistleblowing may be deterred for fear of retaliation, or for lack of incentives. Reporting of infringements of this Regulation is necessary to ensure that a competent authority may detect and impose sanctions for market abuse. [...] This Regulation should therefore ensure that adequate arrangements are in place to enable whistleblowers to alert competent authorities to

possible infringements of this Regulation and to protect them from retaliation.” Article 32 of the Regulation contains the necessary provisions.¹⁴

In the field of money laundering, Article 38, of the EU anti money laundering Directive requires member states to “ensure that individuals, including employees and representatives of the obliged entity, who report suspicions of money laundering or terrorist financing internally or to the FIU, are protected from being exposed to threats or hostile action, and in particular from adverse or discriminatory employment actions”.

The sheer variety of the sectors in which legislative and other means to protect whistleblowers are already in place at the EU level to ensure the effectiveness of EU policies shows that we are confronted here with an argument for taking common action to protect whistleblowers that is valid generally. A number of EU policies could be better implemented if there were whistleblower provisions in place, for example with regards to structural funds or state aid. Setting common minimum standards helps to create a level playing field, and prevents fragmentation of the implementation of EU policies. Otherwise, what is likely to happen is that a patchwork of whistleblower provisions will continue to be inserted in into various pieces of legislation that will simply serve to confuse matters further.

¹⁴ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0596&from=EN>

Some more specific references to whistleblowers that already exist for the correct implementation of EU legislation:

- Preamble 41 of Directive 2013/30/EU on safety of offshore oil and gas operations¹ states the following: “[t]o ensure that no relevant safety concerns are overlooked or ignored, it is important to establish and encourage adequate means for the confidential reporting of those concerns and the protection of whistleblowers”. Annex IV, Article 1(e) contains provisions to this end.
- In the area of transportation safety, Regulation 376/2014 on the reporting, analysis and follow-up of occurrences in civil aviation highlights both the need to protect aviation staff reporting on potential safety hazards, and the importance of acting on their reports and providing them information on the action taken: “Various categories of staff working or otherwise engaged in civil aviation witness events which are of relevance to accident prevention. They should therefore have access to tools enabling them to report such events, and their protection should be guaranteed. In order to encourage staff to report occurrences and enable them to appreciate more fully the positive impact which occurrence reporting has on air safety, they should be regularly informed about action taken under occurrence reporting systems” (Preamble 9.) The regulation also requires member states to “define the consequences for those who infringe the principles of protection of the reporter” (Preamble 42). The relevant provisions are set out mainly in Article 16, which also contains measures to protect the identity of those who choose to report anonymously.¹
- Article 38 of the Anti-Money Laundering Directive 2015/849 is already quoted in the text above. In addition, the preamble also states that “it is crucial that [the issue of protecting whistleblowers] be addressed to ensure the effectiveness of the AML/CFT system” (Preamble 41).¹ Article 37 of the Directive establishes that “[d]isclosure of information in good faith by an obliged entity or by an employee or director of such an obliged entity [...] shall not constitute a breach of any restriction on disclosure of information imposed by contract or by any legislative, regulatory or administrative provision, and shall not involve the obliged entity or its directors or employees in liability of any kind even in circumstances where they were not precisely aware of the underlying criminal activity and regardless of whether illegal activity actually occurred.”

2.4 Whistleblowing across the EU can tackle issues that know no borders

2.4.1 Environmental damage and public health risks

Damages to the environment and threats to public health are typically ignorant of borders. As noted in an OECD document on the environmental risks associated with mining and forestry, certain types of environmental misconduct are hard to control externally, and whistleblowing may be an indispensable tool to prevent risks.¹⁵ **Weak or non-existent protection for whistleblowers in one country may prevent the timely detection of such risks, and thus put the safety and environmental self-determination of the citizens of neighbouring countries in jeopardy.**

A poignant illustration is the disaster that occurred in January 2000 in Baia Mare, Romania, which involved the release of cyanide and heavy metals into three rivers from a gold processing plant and the subsequent poisoning of the water, and thus the flora and the fauna, in large areas not only in Romania, but also in Hungary, Serbia, and Bulgaria.

Another example which involves environmental protection and also corruption is the “Acuamed” case in Spain. Azahara Peralta Bravo was head of the Acuamed project which was supposed to clean the Ebro river in Spain from contamination. When she refused to sign off on additional, questionable costs, she began to suffer at work and then was fired in July 2015, along with 10 other colleagues from the same department.

¹⁵ <https://www.oecd.org/env/1819792.pdf>

The “Dieselgate” scandal

In September 2015, the United States Environmental Protection Agency found out that the Volkswagen Group programmed their direct injection turbo diesel engines to activate certain emission controls only when they were being tested for compliance with environmental regulations.¹ The fraud affected about 11 million cars sold by the group between 2009 and 2015. The scandal started with two American whistleblowers who tipped off the US Environmental Protection Agency. VW pledged to get to the bottom of the case and explore fully the roots of scandal. They have called for internal whistleblowers to come forward to testify, without fear of repercussion from VW’s part, and later reported that about 50 internal whistleblowers spoke up to help the internal investigations.¹

Everybody would have been better off had the whistleblowers spoken up earlier. A car manufacturer selling millions of cars with fake emission parameters is a public health risk. Studies that appeared in peer-reviewed journals estimate that the extra pollution emitted by VW cars in the period during which the emission test rigging went unnoticed is responsible for 59 premature deaths in the US alone,¹ and costs 45,000 disability-adjusted life years and 39 billion dollars in health cost in the US and Europe combined,¹ figures which are bound to rise with any delay in the fixing of the engines.

VW’s competitors that invested extensively into meeting the emission standards VW chose to deflect suffered, or, as recent news seem to suggest, they might have felt pushed to cut corners in a similar fashion.¹ However, whatever VW gained by choosing to cheat on emission tests it must have lost since: it had to work out a 15 billion dollar settlement with US authorities, its sales in the US plummeted by 25%, the value of the company’s shares dropped by about 30% right after the outbreak of scandal, and the company’s operating margin fell way behind that of main rival Toyota.¹ In November 2016, VW and its labour unions had to agree to cut about 30,000 jobs by 2021 to boost the company’s shaken competitiveness.¹

2.4.2 Consumer rights and product safety

Whistleblowers can help to detect faulty products or practices in the supply chain, and this is particularly important for products that are also sold in countries other than the one in which they are manufactured, which is the rule rather than the exception in the EU’s common market.

Consumer rights are protected under Article 38 of the Charter of Fundamental Rights of the European Union and are codified in Articles 4(2)(f), 12, 114(3) and 169 of TFEU. Article 169 supplements the internal market provisions by indicating that the Commission will take as a base a high level of

protection when it comes to health, safety, environmental and consumer rights issues. This means that it is particularly important to ensure a good strategy for the **prevention** of any hazards to these public interests, and hence whistleblower protection is key.

This is particularly the case for companies with a long and complex food supply chain, since it is difficult to know exactly at what stage in the production chain - or in which country - there might be a risk of a health hazard. It is therefore essential that there be common minimum standards that guarantee uniform protection across the Union; and that protect those speaking out about public health or food safety issues. For areas such as this, it is always better that potential problems – particularly about food - be reported before the products are shipped out for sale.

Indeed, whistleblower protection is not only relevant for the rights of consumers and the quality of the products sold on the EU market, but it can clearly have a bearing on public health and safety as well.

It should also be highlighted that government authorities are very unlikely to be able to fully control the quality of every single item of consumer products or foodstuffs that are sold on the market. When coupled together with diminishing resources for public inspection agencies, the trend will be to increasingly rely on whistleblower alerts. Indeed, we may have been able to avoid the horsemeat scandal (or uncover it earlier) if there had been more robust whistleblower protection in place!

The Nestlé Whistleblower

Yasmine Motarjemi was in charge of food safety at Nestlé, where she began to work in 2000. She uncovered a problem with Nestlé baby biscuits that were choking babies in France, amongst other food safety and public health issues. A new Director was recruited from that same French branch and he subsequently attempted to prevent her from uncovering further problems. She requested a food safety audit and investigations from the top levels of management, but little was done to address the issue.

As she struggled to do her job and blow the whistle, scandals like the contamination of products with melamine in China and the outbreak of E. coli O157 in the USA in 2009 erupted. Yasmine says that they were preventable, but she suffered harassment in the workplace and is currently battling Nestlé before the courts in Switzerland since 2011. Nestlé accuses her of violation of corporate secrecy.

On a common market, it makes little sense that consumers would only find out about a faulty or fake product if somebody in a country in which there is robust protection is able to come across the scandal and safely report it. Consumer rights and health epidemics know no borders, especially in today's globalised world.

2.4.3 The unity and proper functioning of the common market

Article 26 TFEU makes it the Union's competence and responsibility to "adopt measures with the aim of establishing or ensuring the functioning of the internal market" and Article 114 foresees that the European Parliament and the Council shall establish legislative measures to this end. **Whistleblowing is an essential element of the culture of accountability that is necessary for the fairness of competition and the proper functioning of the internal market.** In turn, significant variations in the ways in which different member states provide protection for whistleblowers create disparities that are potentially detrimental to the integrity of the internal market.¹⁶

Whistleblowers also serve to protect the integrity of the common market by allowing for cartels or collusion between companies in the same sector to be uncovered, as highlighted in the box below.

EU Anti-trust whistleblower platform

Cartels and other anti-competitive practices are deemed "incompatible with the internal market" in Article 101 TFEU, and so on 16 March 2017, the Commission launched a new whistleblowing tool to make it easier for prospective whistleblowers to alert the Commission on cartels and other anti-competitive practices, using advanced tools to protect the identity of the whistleblowers if they choose to report anonymously.¹

In addition, following the adoption of the Trade Secrets Directive, which enacted a wide range of protections for business secrets and included a carve-out to exempt whistleblowers acting in the public interest from prosecution under the Directive, it is now necessary to ensure also an even level of protection for whistleblowers. This will help to avoid further fragmentation and additional

¹⁶ <http://www.world-psi.org/en/checkmate-corruption-making-case-wide-ranging-initiative-whistleblower-protection>

confusion resulting from the varied transposition of the whistleblower exception in the different Member States.

Furthermore, **whistleblowing is good for businesses**. According to a 2012 study that appeared in *World Economics*, on average more than 25% of a company's market value is directly attributable to its reputation.¹⁷ Good reputation can help attracting new customers and creating brand loyalty among current ones. It attracts investors, and it is also essential for being able to recruit and keep high-performing employees. On the other hand, in today's highly interconnected world, serious reputation damage may bring down a company in a matter of days or maybe hours. Deloitte's 2013 global executive survey on strategic risks found that reputation damage is the number one risk concern for 87% of the business executives they have surveyed around the world.¹⁸

According to a 2010 survey referenced in the Commission's Inception Impact Assessment, there is a strong correlation between long-term (over 10 years) shareholder return and the employees' comfort in speaking up. Having a functional whistleblowing system can also help to increase investor confidence in EU enterprises and is a way of protecting a company's shareholders. On the other hand, recent cases like Siemens' string of bribery scandals in the 2000s, or Volkswagen's recent emission scandal (discussed above), demonstrate that the lack of an effective early warning system to uncover wrongful practices at a stage when the damage they cause is still manageable, may lead them to escalate into problems that cause losses of devastating magnitudes in both revenue and brand value. Maintaining integrity and accountability, including by protecting whistleblowers, is the good strategy in the long run.

Whistleblowing arrangements that guarantee that the lid will not be put on problems, are an essential component of a good business strategy that yields in the long term. The fairness of competition, even in the short term, however, is greatly improved if businesses can be sure that not just their own employees but also the employees of their competitors enjoy high-level protection if they report on wrongdoing, not only internally, but also externally if necessary. Whistleblower protection is therefore an indispensable tool for ensuring the effectiveness and integrity of the common European market.

¹⁷ Simon Cole, "The Impact of Reputation on Market Value" (World Economics, September 2012)

¹⁸ https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Governance-Risk-Compliance/gx_grc_Reputation@Risk%20survey%20report_FINAL.pdf

2.4.4 Workers' rights and working conditions in the EU

Most whistleblowers are insiders of an organisation in which they encounter wrongdoing or a threat to the public interest and report it – indeed, research from the UK shows that the vast majority of whistleblowers tend to raise alerts internally¹⁹. Their being insiders usually stems from some work-related relationship with the organisation in question, and the hardships that they typically suffer from after raising concerns about wrongdoing almost always start at the workplace. Partly because of this work-based relationship, they find themselves in a situation of power-imbalance, which is one of the main reasons why they need special protection.

Whistleblower protection is therefore an issue that bears significantly on working conditions. Whistleblower protection is a safeguard for the worker from reprisals that affect the conditions of their employment including dismissal, demotion or the withholding of promotions, training and other career development opportunities, loss of benefits, change of workplace or working hours as a means of retaliation, disciplinary measures and penalties, or fear of being harassed and bullied.

Safe channels of raising their concerns, in turn, empower workers to step up against injustice and initiate a change for the better at their workplace. It helps them to feel personally invested in the future of their company, and with the sufficient agency to contribute to its development. Indeed, research has shown that people who live with wrongdoing but are unable to raise a concern or take corrective action suffer from physical and psychological damage and are more likely to leave their jobs or disengage²⁰. Conversely, the freedom to speak up without fear of retaliation is an essential element of psychological safety, with studies showing a correlation between perceptions of procedural justice at work and one's health²¹. Article 153 TFEU gives competence to the Union to support and complement the member states' efforts, including by adopting legislative measures, to improve working conditions.

¹⁹ Whistleblowing: The Inside Story <http://www.pcaw.org.uk/files/Whistleblowing%20-%20the%20inside%20story%20FINAL.pdf>

²⁰ Documented by David Lewis, Professor of Employment Law at Middlesex University in "The health, safety and welfare case for requiring an EU Directive on whistleblowing"

²¹ See Miceli, Near and Dworkin in "Whistleblowing in organizations", 2008 and "The influence of procedural justice and change in procedural justice on self-rated health trajectories: Results from the Swedish Longitudinal Occupational Survey of Health" in the Scandinavian Journal of Work, Environment and Health, 2016.

Although it is always immensely more difficult for a person to relocate and work in a country other than his or her own than moving goods and capital around, in the EU's common market the free movement of goods and capital is accompanied by the free movement of labour force. As it was put in the blog of the trade union Eurocadres, leading a platform of unions and NGOs campaigning for comprehensive EU-legislation on whistleblowing, “[w]hen companies have activities across borders and workers are mobile, we cannot have a situation where it is impossible to know what your actual protection would be, if any. If you are a French worker, living and working in Spain for a German company, and you come across information about wrongdoings in the factory of the company in Poland...? What if the company is also active in different sectors? With a patchwork of legislation both in terms of national legislation and sectorial, it can easily become an almost impossible challenge to know your rights.”²²

There may well be cases when the protection of an important public interest, maybe one that affects more than one country, hinges on whether a worker in a similar situation who came to know critical information can figure out, in time and with a realistic effort, what protections he or she may count on after having blown the whistle. There should therefore be common minimum standards that apply uniformly to simplify the current situation.

Whistleblowing is also intrinsically linked to the protection of the rights of workers. In the European Union, workers are generally mobile and there are plenty of companies that are active in more than one jurisdiction. Whistleblowers can therefore help to uncover violations of workers' rights – it could be a case of unsafe working conditions, irregular contracts, unfair treatment, harassment, etc. For example, violations or abuses in which foreign workers are posted to another EU country without having the corresponding social security payments covered, could be prevented and better dealt with if horizontal whistleblower protection covering employees in both the private and public sector were in place.

²² <http://www.eurocadres.eu/whistleblowers-must-be-protected/>

2.4.5 Tax evasion and avoidance

There is hardly any issue with a more obvious EU relevance than certain EU countries pursuing predatory tax policies to rob other member states of their tax revenues on an industrial scale. The practice of negotiating individualised tax deals with certain corporations also heavily distorts competition on the EU market by granting unjustified advantages to the corporations that benefit from the deals at the expense of their competitors.

We have a well-known recent case at hand in which whistleblowers disclosed information on hundreds such secret deals between the tax authority of Luxembourg and multinational corporations. In the wake of their disclosure, the European political institutions are taking steps to curb this practice. **The discussion and action at the EU level, hopefully leading to more transparent and fairer regimes of corporate taxation in the EU, was made possible by the whistleblowers who stepped up to protect the public interest.**

The “Luxleaks” scandal

In late 2014, the International Consortium of Investigative Journalists released tens of thousands of pages documenting tax deals between Luxembourg and more than 500 companies worldwide aiming to reduce their tax payments. The main sources of the documents were Antoine Deltour and Raphael Halet, two former employees of the international accounting firm PricewaterhouseCoopers. The Public Prosecutor’s Office of Luxembourg charged the two whistleblowers with theft, disclosing of confidential information and trade secrets, and fraud.

In June 2016, the court of first instance convicted both whistleblowers to suspended imprisonment and a fine. In March 2017, the appeals court retained both the suspended prison sentence and the fine in Deltour’s case, and the fine in Halet’s. Even though Luxembourg was listed among the very few EU countries with relatively advanced legal protection for whistleblowers in a recent survey of whistleblower protection in EU member states by Transparency International,¹ the court of first instance argued that the Luxembourgish Labour Code—the law that contains the relevant provisions—protects whistleblowers only if they uncover wrongdoing that fits one or another of a narrow list of categories, and thus Deltour and Halet enjoyed no protection under Luxembourgish law.

The court also explicitly noted that although there are ongoing discussions on proposing an EU directive on whistleblower protection, these discussions yielded no result so far, so the two whistleblowers do not presently enjoy protection at the EU level either—also noting that their cases do not fit the narrow scope of the whistleblowing provisions in the trade secrets directive.¹

The appeals court discussed the case mostly on the ground of the case law of the European Court of Human Rights interpreting Article 10 of the European Convention on Human Rights upholding the freedom of expression, and acknowledged that the disclosure of the documents served the public interest, that the public interest outweighed the legitimate interests of PwC and its clients, and that reporting internally at the whistleblowers’ workplace, or to the Luxembourgish authorities, instead of disclosing the evidence to the press, was not an option in the given circumstances.

The court argued, however, for retaining Deltour’s suspended prison sentence mainly by claiming that his actions were not directed at preventing an imminent danger, and that when he downloaded the tax ruling documents, he had not yet grasped their full significance and had not yet formed a clear intention about how he would use them.¹

Deltour was previously awarded the European Citizen’s Prize by the European Parliament for exactly the same actions for which he was convicted in Luxembourg. At the start of the trial, Commissioner Verstager, commented that “It is very difficult for me to say anything about it, because I cannot do anything about it. Every member state has a different set of rules. But of course Luxleaks could not have happened if it was not for the whistleblower, and the team of investigative journalists. The two worked very well together to change the momentum of the debate about corporate taxation in Europe.”¹

The list of tax fraud cases expose by whistleblowers is long: Hervé Falciani and HSBC Switzerland, the UBS France case exposed by Stéphanie Gibaud, Rudolf Elmer of Julius Baer Group AG, the “Castellana Papers” in Spain providing details about high-level clients of certain tax consultancies.

Another major leak, by a whistleblower by the pseudonym John Doe, of millions of documents has recently revealed tax evasion practices with the help of a Panama-based law firm, involving also European political and business leaders, and celebrities. Commenting on the case, Commissioner Moscovici estimated that the extensive practice of hiding assets offshore may cost one trillion euros in public finances annually.²³

2.4.6 Protection of the EU’s financial interests

In many cases, whistleblowers speak up in defence of the EU’s financial interest. Across the EU, VAT fraud, which also has an impact on the EU’s financial interests, amounts to 50 billion euros’ worth per year.

The importance of the role of whistleblowers in the protection of the EU’s financial interests was outlined in a report titled “The role of whistleblowers in the protection of EU’s financial interests”. The report was adopted in February 2017 by the European Parliament, with more than 600 votes in favour.²⁴

The resolution highlights the need for making it safer and easier for whistleblowers to call attention to the misuse of EU funds, and calls on the Commission “to submit a legislative proposal before the end of this year protecting whistleblowers as part of the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Union, with a view to affording effective and equivalent protection in the Member States and in all the Union’s institutions, bodies, offices and agencies.” The report also foresees the establishment of “an independent information-gathering, advisory and referral EU body, with offices in Member States which are in a position to receive reports of irregularities.”

²³ <http://www.politico.eu/article/pierre-moscovici-european-union-must-act-quickly-on-panama-papers/>

²⁴ <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2017-0022&language=EN&ring=A8-2017-0004>

It is also important to highlight the role of the EU institutions in financing projects in third countries. The European Investment Bank is one of the world's largest development finance institutions, lending for example EUR 72 billion for 460 projects around the world in 2010.²⁵ Protecting whistleblowers who can reveal where money is wasted or misspent would therefore be beneficial both for the EU institutions themselves, which must be seen as acting congruently, on the basis of the same values both externally and internally, and for the citizens which are robbed of their futures through corruption and other illicit activities.

2.4.7 Prevention of cross-border corruption and crime

The Commission has estimated that in the EU, 120 billion euros is lost annually due to corruption.²⁶ Surveys on its perceived extent also underline that corruption is a pressing problem in the EU: More than three out of every four EU citizens think that corruption is widespread in their country. Although two-thirds of the respondents say they would report corruption, one in three thinks reporting is pointless as those responsible would go unpunished, and 31% think that people might choose not to report corruption because there is no protection for those who do. Of those Europeans who claim to have actually witnessed corruption, three out of four say that they did not report it.²⁷

There is abundant proof, on the other hand, that whistleblowing is an exceptionally effective means to uncover corruption, fraud, and other kinds of wrongdoing to which secrecy is essential. A 2016 global study on fraud analysing more than 2400 cases of fraud in 114 countries found that about 40% of all detected fraud cases are uncovered by whistleblowers.²⁸ The 4th Biennial Global Economic Crime Survey in 2007, cited by the Commission, found that whistleblowers are responsible for 43% of fraud detection, more than corporate security, audits, rotation of personnel, fraud risk management and law enforcement taken together.

²⁵ <http://www.eib.org/infocentre/press/news/all/european-investment-bank-and-ifc-developing-clean-energy-lending-facility-for-kenya.htm>

²⁶ European Commission, EU Anti-corruption Report, 2014. Available at http://ec.europa.eu/dgs/home-affairs/e-library/documents/policies/organized-crime-and-human-trafficking/corruption/docs/acr_2014_en.pdf

²⁷ Special Eurobarometer 397/ Wave EB79.1 – TNS Opinion & Social, pp. 100-106, available online at <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/yearFrom/1973/yearTo/2015/search/corruption/surveyKy/1076>

²⁸ Association of Certified Fraud Examiners, *Global Fraud Study 2016*. Summary available on-line at <http://www.acfe.com/rtn2016/about/executive-summary.aspx#>

These figures, also considering the unevenness of protection for whistleblowers in the EU member states,²⁹ suggest that whistleblowing is an indispensable tool to protect the public interest but it is far from being used to its full potential in the EU. In the USA, the largest settlement gained thanks to its whistleblower law was from the UK pharmaceutical company GlaxoSmithKline, which pleaded guilty to criminal charges and ended up paying \$3 billion in fines for promoting antidepressants for unapproved uses and failing to report essential health data about one of their diabetes medicines.

In many cases, wrongdoing has a cross-border dimension, and so does its effects: It may concern the use of EU public funds, it may occur at organisations that operate on the common EU market, it may affect competition between economic players located in different EU countries, it may affect consumer trust and the flow of investments well beyond a single member state, or may come with adverse social, public health, environmental or economic consequences that do not stop at borders.

The submarine scandal

A well-known example of cross-border corruption is the 2004-2006 Portuguese-Greek-German submarine scandal.¹¹ This case had many features relevant to our point: an industry in which competition between players from different countries is heavily infested with bribery, party financing or kickbacks from corruption in public procurement, and the misuse of enormous amounts of public money at the height of a debt crisis that has shaken the societies of the countries involved and triggered a whole-sale European political crisis.¹

A large number of people were aware of the corrupt deals, but potential whistleblowers were prevented from speaking up, in Greece, by a huge inconsistency between the legal obligation of every citizen to report to the authorities on wrongdoing and the almost complete lack of protection (before the new provisions were adopted, following this scandal and a string of similar ones, in 2014)¹, and, in Portugal, by a legal culture that is expressly hostile to whistleblowing with practically no protection afforded to those whose speak up defending the public interest.¹¹

Evidence for bribery in the Greek case involving a German consortium led by Ferrostaal¹ was reportedly stumbled upon in the context of an investigation into one of Siemens' numerous bribery cases in the same period, many of which were also uncovered by whistleblowers.¹

²⁹ http://www.transparency.org/whatwedo/publication/whistleblowing_in_europe_legal_protections_for_whistleblowers_in_the_eu

2.5 Whistleblowing is a human right that protects other human rights

2.5.1 The Charter of Fundamental Rights of the EU and the European Convention on Human Rights

The case law of the European Court of Human Rights interprets whistleblowing as a form of freedom of expression protected under Article 10 of the European Convention on Human Rights, to which all EU countries are parties, and retaliation against whistleblowers is seen as an infringement of this fundamental right.

As formulated in both Article 10 ECHR and Article 11 of the Charter of Fundamental Rights of the EU, the freedom of expression includes the right to receive information, so it concerns, besides the right of the whistleblower to speak up, also the right of the members of the public to know the information that pertains to the public interest if such information is disclosed by the whistleblower. According to paragraph 2 of Article 10 ECHR, the exercise of these freedoms may be subject to conditions and restrictions “as are prescribed by law and are necessary in a democratic society” that are in place in the interest of “the protection of the reputation and rights of others”, and of “preventing the disclosure of information received in confidence.” **The rulings of the ECtHR interpret how whistleblowers’ freedom of speech and the public’s right to know is balanced against these legitimate interests.**

There are also other fundamental rights recognized in the EU Charter that would enjoy fuller protection if even and comprehensive protection for whistleblowers was in place in the EU, including the right to protection against unjustified dismissal (Article 30) and the right to an effective remedy and a fair trial (Article 47).

The European Court of Human Rights' Jurisprudence revolves around Freedom of Expression

An important case is *Heinisch v. Germany*, no. 28274/08.¹ Brigitte Heinisch was a geriatric nurse in a Berlin nursing home run by the state-owned health care company Vivantes. The home was chronically understaffed and it could not provide even for the most basic hygienic needs for the residents, while the staff was expected to falsify documents to report services that had never been provided. Repeated complaints and notes by staff members, including Heinisch, to the management about the inhumane conditions went unheeded.

Heinisch therefore sought the advice of a lawyer. In November 2004, her legal counsel wrote to the Vivantes management about her concerns, which in their analysis might have also led to the criminal liability of the staff, and set a deadline for addressing them. After the management refused to address Heinisch's concerns, her lawyer filed a criminal complaint against Vivantes in December 2004. Heinisch was then fired, and lost her labour court case against her employer.

However, weeks after her court case was lost, the regulator held an inspection at her workplace and found that conditions were indeed terrible. Supported by a labour union representing public service employees, Heinisch took her case to the ECtHR arguing that her dismissal infringed her right to freedom of expression as provided in Article 10 of the Convention. The representative of the German government argued, in turn, that the interference with the Heinisch's right to freedom of expression was justified under paragraph 2 of Article 10 since her dismissal was a necessary and proportionate means to protect the reputation and rights of her employer.

The Court ruled in Heinisch's favour, after which she took her employer back to a domestic court and received a settlement. In its ruling, the ECtHR clarified, referring back to previous rulings, that a restriction on the exercise of the freedom of expression is "necessary in a democratic society" in the sense of Article 10 § 2 only if "the adjective 'necessary' ... implies the existence of a 'pressing social need,'" and that "that there is little scope under Article 10 § 2 of the Convention for restrictions on debate on questions of public interest."

The court also expressed its view that "weighing an employee's right to freedom of expression by signalling illegal conduct or wrongdoing on the part of his or her employer against the latter's right to protection of its reputation and commercial interests" is necessary, and the duty of loyalty and discretion of an employee requires that "disclosure should be made in the first place to the person's superior or other competent authority or body," but when "this is clearly impracticable" the disclosure can be made to the public.

The court concluded that the "domestic courts failed to strike a fair balance between the need to protect the employer's reputation and rights on the one hand and the need to protect the applicant's right to freedom of expression on the other," and that "there has accordingly been a violation of Article 10 of the Convention." The court also noted that "apart from specific legislation with respect to civil servants exposing suspected cases of corruption, German law does not contain general provisions governing the disclosure of deficiencies in enterprises or institutions, such as illegal conduct on the part of the employer, by an employee ('whistleblowing')," and that "German law does not provide for a particular enforcement mechanism for investigating a whistleblower's complaint and seeking corrective action from the employer."

2.5.2 Media freedom and democratic accountability

Article 11 of the Charter of Fundamental Rights mentions the freedom and pluralism of the media as essential to the freedom of expression and information. **Uncovering wrongdoing by means of journalistic investigations is among the most important elements of the media's control function in a democratic society. The protection of the sources of investigative journalism is a precondition for its functioning.**

As mentioned in the Commission's Inception Impact Assessment, the role of whistleblowers as journalistic sources was addressed in the second Annual Colloquium on Fundamental Rights in November 2016, this time focused on media pluralism and democracy. At the colloquium, Commissioner Jourová said "The ability of journalists to effectively shield their sources, and the protection of whistleblowers, are vital for facilitating the watchdog function of investigative journalism. This in turn is key for democratic accountability, good governance and the rule of law."

Protecting whistleblowers and investigative journalism is one of the six key actions that have been identified as necessary in the discussion. Participants raised the concern that the confidentiality of journalists' communication with their sources is increasingly undermined by surveillance and metadata analysis, and that the journalists' right to protect their sources is increasingly ineffective unless it is complemented by credible and effective protection for whistleblowers against retaliation. Participants expressed dissatisfaction with the uneven and in many cases inadequate level of whistleblower protection in member states.³⁰

2.5.3 Uncovering human rights abuses

It goes without saying that whistleblower provisions can help to uncover abuses of human rights or human dignity, whether in the work place, in health care, in the armed forces or police, etc. These abuses can take place inside the EU Member States, can affect the rights of European citizens (e.g. mass surveillance from other jurisdictions) or they can be effected by EU nationals in third countries. In all cases, the need for whistleblower protection to ensure that abuses are prevented and uncovered is evident.

³⁰ http://ec.europa.eu/information_society/newsroom/image/document/2016-50/2016-fundamental-colloquium-conclusions_40602.pdf

French UN peacekeepers committing human rights abuses

The well-known case of UN peace keepers abusing young children was brought to light by a whistleblower named Anders Kompass, who reported to the French UN Mission in Geneva that there were soldiers in the Central African Republic, of French nationality, who were sexually abusing young impoverished children. Kompass was suspended from his duties in April 2015. His colleague, Miranda Brown, sought to alert the US Permanent Mission to the EU in Geneva about the abusive dismissal of Mr. Kompass but she was also eventually let go, whilst on sick leave (which was to some extent also related to a previous case of harassment that she had suffered at the workplace in the World Intellectual Property Office).

In the area of the rights of patients and those being cared for, the Paolo Macchiarini scandal at the Karolinska Institute is just one recent example. Macchiarini joined the institute in 2010 and he violated established medical practices including by performing unethical experimental surgeries on people who were seriously ill, many of whom then died. It then became known that, despite the concerns raised by his colleagues, he was being protected by the hierarchies in the Institute because he was a well-known, innovative surgeon - while the whistleblowers were threatened with dismissal. Eventually, the scandal broke in the media and since then, those protecting him have been removed. Since June 2016, Macchiarini is under investigation by the Swedish public prosecutor's office for [manslaughter](#) and grievous bodily harm. The Swedish government reacted to this scandal by enacting a whistleblower law to cover the private sector, which is in force since 1 January 2017.

3. CONCLUSION: The adequate solution would be horizontal legislative action at EU level

So far we argued that common action to protect whistleblowers in the EU is a key tool to ensure the proper implementation of Union policies in a wide range of sectors, many of which have a cross-border and EU dimension. Whistleblower protection could be a very efficient tool to ensure that the EU public interest prevails and Union resources are used to their best.

Furthermore, the protection of whistleblowers is a necessary element for the protection of rights and for the exercise of freedoms enshrined in the EU Charter of Fundamental Rights which are among the core values on which the EU is built.

The protection of whistleblowers is also necessary for ensuring the effective implementation of EU legislation, and for ensuring the unity and the proper functioning of the EU's common market, including guaranteeing core workers' rights and improving working conditions in the common labour market. Likewise, consumers' rights and environmental protection know no borders. Neither do tax avoidance and evasion, or corruption and fraud.

Indeed, wrongdoing is often facilitated by the additional complications of transnationalism: Those seeking to avoid getting caught or being prosecuted will often take additional steps to hide their trail that involves operating in multiple jurisdictions. Therefore, if the problem is trans-national or if it thrives across borders, the solution should also be supranational.

A strong argument against the sectorial approach is the complications it would create, and the resulting lack of legal certainty, which already exists, and which is precisely the problem we are trying to solve. A continued lack of clarity might land whistleblowers who misunderstand the protections they enjoy – or their employers - in trouble, and it could – and indeed does - deter potential whistleblowers from coming forward. This is why most of the countries that have enacted comprehensive whistleblower protection have chosen to do so after experimenting the loopholes and failures of a sectorial system. Others, like Luxembourg, are currently demonstrating the shortcomings of a narrow approach to whistleblower protection.

For companies operating across multiple jurisdictions, or who operate in different sectors of the market (some of which might enjoy whistleblower protection already, some of which do not), leaving the issue to the member states or continuing the sectorial approach will have little to no positive impact. For regulators, a horizontal approach facilitates consistency in how they are mandated to receive and act upon whistleblower concerns and therefore on how they might work together to address cross-border issues as well.

The final report of the Mahon Tribunal in Ireland concluded that sectorial legislation was opaque and recommended that a more effective approach would be horizontal legislation.³¹ After the Irish whistleblower law came into force, the 18 sectorial legislations were abolished and organisations like Transparency International Ireland saw a 200% increase in the number of whistleblower reports. There is also empirical evidence that strong legislation and a unitary approach does make a positive difference in practice.³²

Irish legislation transformed into horizontal protection for whistleblowers

The shape of the Protected Disclosures Act of 2014, the current Irish whistleblowing legislation which is considered one of the most advanced worldwide, was influenced to a significant extent by the findings of an investigative tribunal into a complex political corruption scandal that took place in the 1990s. The Mahon Tribunal, as it is known after its chair, Judge Alan Mahon, investigated payments to politicians in exchange for re-zoning decisions and planning permits in the Dublin Council area. The investigation started on the grounds of information provided by a retired engineer and former employee of the construction company Joseph Murphy Structural Engineers (JMSE), James Gogarty, about payments that had been made to former chairman of the Dublin City Council, Ray Burke, who was a government minister at the time Gogarty reported that he witnessed a bribe being paid in cash to him.

The tribunal established that the bribery had actually taken place, and Burke eventually served a prison sentence. Investigations into the finances of other councillors were also started by the tribunal, and several of them were found guilty of corruption.

³¹ <https://www.oireachtas.ie/parliament/media/committees/archivedcommittees/cnranda/The-Final-Report-Mahon.pdf> - the chapter on whistleblowing starts on page 2659.

³² Cf. e.g. Skivenes-Trygstad, "When whistleblowing works: The Norwegian case," *Human Relations* 63(7):1071-1097. <http://journals.sagepub.com/doi/abs/10.1177/0018726709353954>

The final report of the tribunal, published in 2012, included a chapter on whether the legal provisions in place at the time to protect whistleblowers were adequate to facilitate the reporting of corruption offences. The report concluded that *“the Tribunal is not convinced that this sectorial approach to whistleblowing protection which has been so favoured by successive governments is the most effective way of providing this protection. In particular, it has led to a very complex and opaque system for protecting whistleblowers which is likely to deter at least some from reporting corruption offences. [...] [T]he Tribunal urges the government to re-consider its approach to whistleblower protection and to bring in a general law protecting all whistleblowers at the earliest opportunity.”* (Pp. 2660-61.)

Finally, it is also necessary to consider that democracy in the whole of the Western world faces challenges it has not faced for a very long time. This challenge manifests itself in symptoms like the loss of trust in democratic institutions, the declining belief in the reality of democratic accountability, and the resulting rise of populism and authoritarianism. Certain EU member states are affected heavily by these tendencies, which, unless countered by adequate measures to restore the credibility and appeal of the democratic ideal, may be also detrimental to the future of the EU itself. **It is time for democratic politics in Europe to invest in integrity and accountability.**

Protecting those who take the courage to speak up against the wrongdoings of the powerful, with the strongest and most effective measures, is vital to win back the trust of the European citizens as well.

In our view, the only adequate course of action is therefore for the European Union to take comprehensive, horizontal legislative action to protect whistleblowers, which covers both the private and the public sectors, as opposed to continuing with the current patchwork or sectorial approach.

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